(6)

No. 02-5664

In The
Supreme Court of the United States

CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals erred in rejecting petitioner's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses would violate his rights under the First, Fifth, and Sixth Amendments?

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The Court of Appeals' opinion is reported at *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002) and is reproduced in the joint appendix hereto at pages 356 through 382. The magistrate judge's opinion, which was not published, is reproduced in the appendix hereto at pages 320 through 338. The District Court's opinion is not reported and is reproduced in the appendix hereto at pages 339 through 355. The Court of Appeals' denial of the petition for rehearing is reproduced on page 383 of the joint appendix.

JURISDICTIONAL STATEMENT

A divided panel of the Court of Appeals entered its judgment on March 7, 2002. On May 7, 2002, by a vote of 5-4, the Court of Appeals denied the petition for rehearing and the petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions.

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

Statutory Provisions.

18 U.S.C. § 4241: Determination of mental competency to stand trial

> (a) Motion to determine competency of defendant. – At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.
>
> (b) Psychiatric or psychological examination and report. – Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

> (c) Hearing. – The hearing shall be conducted pursuant to the provisions of section 4247(d).
>
> (d) Determination and disposition. – If . . . the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility –
>
> (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
>
> (2) for an additional reasonable period of time until –
>
> (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
>
> (B) the pending charges against him are disposed of according to law;
>
> whichever is earlier.
>
> If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to

proceed, the defendant is subject to the provisions of section 4246.

18 U.S.C. § 4246: Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding. – If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report. – Prior to the date of the hearing, the

court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing. – The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition. – If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until –

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

STATEMENT OF THE CASE

I. Dr. Charles Thomas Sell.

Dr. Charles Thomas Sell ("Dr. Sell") is a fifty-three year old dentist who is currently confined in the United States Medical Center for Federal Prisoners (the "Center") in Springfield, Missouri. (Record on Appeal ("Record") 1108, 1136; Appendix ("App.") 339). Dr. Sell is a non-dangerous, pre-trial detainee, who has been confined either at the Center or other facilities for almost five years. (Record 559, 730-46, 1001-09; App. 349-50). Dr. Sell is accused of insurance fraud, but has been adjudged incompetent to stand trial.[1] (App. 339, 359). Dr. Sell's pretrial detention is already longer than the period of time that he would have served if convicted of the fraud charges.[2] Dr. Sell has been diagnosed as suffering from delusional disorder, persecutory type. (App. 30). The government seeks to administer antipsychotic medication

[1] While there are other charges pending, the charges relating to insurance fraud were the sole basis for the Court of Appeals' decision regarding involuntary medication. (282 F.3d at 568 n.8; App. 369).

[2] Using the 1998 version of the Sentencing Guidelines, his total offense level on the fraud charges should be 23 with a criminal history category of I, giving a range of 46-57 months of imprisonment. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, Part A, at 310 (1998). (*See also Sell*, 282 F.3d at 573 (Bye, dissenting); App. 379-80).

to Dr. Sell against his will solely to make him competent to stand trial. (App. 357).

Dr. Sell is an intelligent, educated individual. He graduated from Saint Louis University High School and Saint Louis University, both Jesuit institutions. (Record 1108). He completed his undergraduate degree in 1972 with a major in biology/chemistry and was awarded a doctorate in dental surgery from the University of Missouri-Kansas City in 1976. (Record 1108). After graduation, he obtained a dental license from the Missouri Dental Board (Record 1136) and opened a private dental practice in Des Peres, Missouri. (Record 1108). In private practice, he performed general dentistry, endodontics, oral surgery, periodontics, pedodontics, prosthodontics, and geriatric dentistry. (Record 1099). For several years, Dr. Sell's dental practice thrived in a relatively affluent area of St. Louis County, Missouri.

In 1977, Dr. Sell married his first wife, Deborah. (Record 1091). They had three children together. (Record 1091). In 1983, Deborah left Dr. Sell, which caused him extreme emotional difficulty. (1999 Forensic Psychological Report ("1999 FPR") at 3 (filed under seal)). In 1984, Dr. Sell fell in love with and later married his second wife, Mary, and the couple conceived Dr. Sell's fourth child, Robert L. Sell, in 1987. (Record 1087).

In 1982, Dr. Sell joined the United States Army Dental Reserve. (Record 1130). He received officer training at Fort Sam Houston in Texas. After training, the Army promoted Dr. Sell to the rank of Captain. (1999 FPR at 3). He excelled at his assigned tasks, and effective January 11, 1990, the army promoted him to the rank of Major. (Record 1085).

During the 1980s and continuing into the 1990s, Dr. Sell occasionally suffered from recurrences of the emotional difficulties that had surfaced following his divorce from Deborah, and he periodically sought treatment from psychiatrists or psychologists. (1997 Forensic Report ("1997 FR") at 3 (filed under seal)). He received psychotherapy, and, at times, his clinician treated him with antidepressants. (*See, e.g.*, 1997 FR at 4). Once, in the early 1980s, he was briefly treated with an antipsychotic drug, Haldol. (Record 589). Dr. Sell found the side effects of the drug to be intolerable. (Record 617 (Dr. James K. Wolfson testifying that Dr. Sell had suffered, at minimum, dystonic reaction from Haldol and that Dr. Sell had complained that Haldol gave him "all types of problems")). In fact, Dr. Sell has likened taking antipsychotic drugs to a lobotomy, and he is opposed to antipsychotic medication. (Record 509). He expressed this opposition in his appeal of the Center's administrative involuntary medication decision: "I have a God given right not to have [my brain] altered by the government's antipsychotic, psychotropic medication." (Record 511).

II. Criminal Proceedings.

On May 16, 1997, the government filed a complaint alleging that Dr. Sell had committed insurance fraud by, among other things, submitting doctored invoices to insurers for the purpose of obtaining payment for services not covered by the policies. (App. 1, 7). On May 20, 1997, the government moved for a psychiatric examination to assess Dr. Sell's competency to stand trial. (Record 3-5). A magistrate judge ordered that Dr. Sell be transferred to the Center for a psychological assessment (Record 8-10), and, on June 24, 1997, further ordered that a competency

hearing be held. (Record 11-12). The Center conducted a psychological assessment, and, on June 20, 1997, provided the magistrate judge with a Forensic Report setting forth the Center's findings. (1997 FR at 1). The conclusions in the Forensic Report were tentative because Dr. Sell refused to discuss his case history with the evaluator. (1997 FR at 2). The evaluator, a neuropsychologist, provided the following assessment to the court:

> It must be noted that the undersigned evaluator provides this opinion with less confidence than customary. . . . [I]t is the undersigned evaluator's opinion that Charles Thomas Sell does not currently suffer from a mental disease or defect, and that he is competent to the extent he is able to understand the nature and consequences of the proceedings against him and assist properly in his defense.
>
> ***PROGNOSIS***
>
> Currently, Dr. Sell evidences no obvious signs of psychosis. It is likely his mental status should stay consistent in the near future, but there is a possibility he could develop a psychotic episode depending on the nature of any past mental illnesses. It is impossible for the undersigned evaluator to be more specific given the lack of information. He does have a [sic] paranoid personality characteristics which are pervasive and will color interactions between Dr. Sell, counsel, and the Court.

(1997 FR at 8). At a hearing on July 15, 1997, the court considered the Forensic Report and determined that Dr. Sell was competent to stand trial. (Record 13-15). On July 30, 1997, Dr. Sell was indicted for Medicaid and insurance fraud. (App. 7).

On October 14, 1998, counsel for Dr. Sell filed a notice of intent to introduce evidence of mental disease or defect (Record 285-86), and, in response, the government requested an additional psychiatric examination (Record 287-88, 303-07), which Dr. Sell opposed. (Record 293-302). On November 25, 1998, the magistrate judge denied the government's request for a second competency determination, but ordered a second psychological assessment based upon Dr. Sell's interposition of the diminished capacity defense. (Record 308-17).

Counsel for Dr. Sell then enlisted the services of a private psychiatrist, Dr. C. Robert Cloninger, to conduct an independent assessment of Dr. Sell's competency. (Record 326-27). Dr. Cloninger is the Wallace Renard Professor of Psychiatry at Washington University, a Professor of Genetics & Psychology at Washington University, and the Director of the Center for Psychobiology of Personality with an extensive educational background in the psychology of delusional disorder and personal experience in treating patients with the disorder. (Record 417-58 (Dr. Cloninger's curriculum vitae)). He has over two hundred publications to his credit, and he was head of the Department of Psychiatry at Washington University from 1989 to 1994. (Record 419).

Dr. Cloninger examined Dr. Sell, who cooperated in the examination. (Record 326-27). Dr. Cloninger reviewed Dr. Sell's medical records, spoke personally with Dr. Sell's prior treating physicians, and concluded that Dr. Sell suffered from delusional disorder, persecutory type and that Dr. Sell was not competent to stand trial. (Record 326-27). Counsel for Dr. Sell moved for a second competency hearing. (Record 326-27). On February 16, 1999, the government moved for a competency assessment pursuant

to 18 U.S.C. § 4241(b) (Record 330-32), which was granted by the magistrate judge on February 22, 1999. (Record 337-39). The Center again assessed Dr. Sell and provided the court with a second Forensic Psychology Report. In the 1999 Forensic Psychology Report, the Center agreed with Dr. Cloninger's diagnosis of delusional disorder, persecutory type, finding that Dr. Sell's persecutory delusions were specifically directed to the United States government and its agents. (1999 FPR at 7-8). The Center further found that Dr. Sell was not greatly impaired, was not schizophrenic, did not suffer from bizarre delusions, and did not display prominent hallucinations. (1999 FPR at 8).

Based upon these findings, the District Court found Dr. Sell incompetent to stand trial on April 14, 1999 because Dr. Sell "suffer[ed] from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him, and to assist properly in his defense." (Record 341). Pursuant to 18 U.S.C. § 4241(d), the court committed Dr. Sell to the custody of the United States Attorney General for a reasonable period of time "not to exceed four months." The Department of Justice then committed Dr. Sell to the custody of the Center, where he has been confined now for over three and one-half years, which is in addition to the almost one and one-half years Dr. Sell has spent in various county jails awaiting trial.

III. Delusional Disorder.

As discussed above, both Dr. Cloninger and the Center staff have diagnosed Dr. Sell as suffering from delusional disorder, persecutory type. (App. 30; 1999 FPR at 7-8). The

Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV") describes the diagnostic features of delusional disorders as follows:

> The essential feature of Delusional Disorder is the presence of one or more nonbizarre delusions that persist for at least 1 month (Criterion A). A diagnosis of Delusional Disorder is not given if the individual has ever had a symptom presentation that met Criterion A for Schizophrenia (Criterion B). Auditory or visual hallucinations, if present, are not prominent. Tactile or olfactory hallucinations may be present (and prominent) if they are related to the delusional theme (e.g., the sensation of being infested with insects associated with delusions or infestation, or the perception that one emits a foul odor from a body orifice associated with delusions of reference.) *Apart from the direct impact of the delusions, psychosocial functioning is not markedly impaired, and behavior is neither obviously odd or bizarre* (Criterion C). If mood episodes occur concurrently with the delusion, the total duration of these mood episodes is relatively brief compared to the total duration of the delusional periods (Criterion D). The delusions are not due to the direct physiological effects of a substance (e.g., cocaine) or a general medical condition (e.g., Alzheimer's disease, systematic lupus erythmatosus) (Criterion E).

(Record 638-39, 766 (emphasis added)). Persons suffering from delusional disorder may be unimpaired in their occupational and social roles, and any delusions are generally plausible ideas "that can conceivably occur in real life." (Record 767). In fact, prior to and at the time of

his arrest, Dr. Sell was functioning perfectly well in society. (Record 640).

Delusional disorder may be subcategorized based upon the predominant delusional theme. Dr. Sell has been diagnosed as suffering from the persecutory subtype of delusional disorder, which DSM-IV defines as follows:

> **Persecutory Type.** This subtype applies when the central theme of the delusion involves the person's belief that he or she is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals. Small slights may be exaggerated and become the focus of a delusional system. The focus of the delusions is often on some injustice that must be remedied by legal action ("querulous paranoia"), and the affected person may engage in repeated attempts to obtain satisfaction by appeal to the courts and other government agencies. Individuals with persecutory delusions are often resentful and angry and may resort to violence against those they believe are hurting them.

(Record 768).

A prominent feature of Dr. Sell's disorder is his belief that the FBI is plotting to discredit and/or kill him. (Record 807, 809; 1999 FPR at 6). This delusion involves Dr. Sell's belief that his Army Reserve assignment to Fort Sam Houston, Texas in April, 1993 was made in anticipation of an incendiary assault on the Branch-Davidian, Waco, Texas, compound in which government agents might die and require dental record identification. (Record 376-78). Dr. Sell believes that he watched the incident on a closed circuit transmission different from that which was generally broadcast, and which showed the intentional burning

of the compound by government agents. (Record 376-77). He told his psychiatrist about his perception of the events at Waco and believes this information was forwarded to the FBI. (Record 377-78). According to Dr. Sell, in an effort to conceal the "truth" about Waco, the FBI arranged for Dr. Sell to be charged with insurance fraud to discredit him and may seek to kill him. (Record 378).

The indicated treatment for delusional disorder is still the subject of debate. (App. 345 (United Stated District Court Judge Donald J. Stohr acknowledging the debate among experts)). For example, one of the texts upon which the government clinicians have relied and which the government clinicians identified as being authoritative in the field (Record 584) describes the treatment indicated for persons suffering from delusional disorder:

> The goals of treatment are to establish the diagnosis, to decide on appropriate interventions, and to manage complications. Fundamental to the success of those goals is an effective and therapeutic doctor-patient relationship. Establishing that is far from simple. The patients do not complain about psychiatric symptoms and often enter treatment against their will. Even the psychiatrist may be brought into the delusional nets.
>
> . . . .
>
> Delusional disorder is a psychotic disorder by definition, and the natural presumption has been that the condition would respond to antipsychotic medication. Because controlled studies are lacking and the disorder is uncommon, the results required to support this practice have not yet been obtained.

(Record 994-95). Despite their endorsement of this text during the involuntary medication hearing, both government witnesses testified that antipsychotic medication was effective in treating delusional disorder. (*See, e.g.*, Record 583).

IV. The Involuntary Medication Proceedings.

In 1999, the Center sought to forcibly drug Dr. Sell to attempt to restore him to competency. (Record 348). On June 9, 1999, the Center conducted an administrative hearing pursuant to 28 C.F.R. § 549.43 after which the Center authorized itself to forcibly drug Dr. Sell with antipsychotic medication to restore Dr. Sell to competency. In connection with these proceedings, Dr. C.D. Glazzard, the Center's reviewing psychologist at the time, prepared an Involuntary Medication Report ("IMR"). (App. 141-51). In the IMR, Dr. Glazzard summarized Dr. Sell's statement in opposition to the medication: "I do not want to take medicine. I do not want my chemistry altered. My brain is working well." (App. 142).

At the hearing, the government did not claim that Dr. Sell was dangerous. The IMR contained a separate section allowing the examiner to check off the specific findings upon which the involuntary medication determination had been made. (App. 144-45). The options included the opportunity to make determinations of dangerousness and competency to stand trial. (App. 144-45). The dangerousness entry was marked "No." (App. 144). The competency to stand trial entry was marked "Yes." (App. 145). The Warden reviewed and affirmed the administrative decision. (App. 152-57). He, too, did not find Dr. Sell to pose a danger to himself or others.

Dr. Sell then sought judicial review of the administrative decision, which the magistrate judge granted on August 20, 1999. (Record 357, 517-19). At the judicial hearing on September 29, 1999, the government claimed for the first time (and without notice to Dr. Sell) that Dr. Sell should be forcibly drugged because Dr. Sell posed a danger to himself or others. (Record 523; App. 172-73). The basis for the government's dangerousness theory was, among other things, Dr. Sell's alleged acts of familiarity with a nurse (Nurse Goldberg) at the Center – acts such as addressing the nurse by her first name. (App. 168-70, 263-64). The magistrate judge heard the testimony of a government psychologist and psychiatrist, who opined that this behavior evidenced dangerousness. (App. 172-73). At the hearing, despite its expressed conclusion that Dr. Sell needed medication, the government refused to identify the antipsychotic drugs or dosages it planned to give Dr. Sell. (App. 189).

Almost a year later, on August 9, 2000, the United States magistrate judge entered an order finding that Dr. Sell posed a danger to himself and others. (Record 816). Based upon this finding, the magistrate judge authorized the government to forcibly medicate Dr. Sell with antipsychotic drugs. (Record 820). Dr. Sell sought review of the magistrate judge's Order with the District Court. (Record 846-64).

On April 4, 2001, the District Court reversed the magistrate judge's finding that Dr. Sell posed a danger to himself and others. (App. 347-50). The District Court held that the record evidence was insufficient to support such a finding and that the magistrate judge's decision was, therefore, clearly erroneous:

> The record does not indicate that defendant has posed a danger to himself or others during the period of his institutionalization at the [Center], and the statements and conduct relied upon for a finding of dangerousness do not suggest a threat of violence to the staff. Without more, this Court deems it clearly erroneous to conclude that defendant presents a danger to himself or others sufficient to constitute a compelling state interest outweighing his interest in refusing antipsychotic medication. . . .
>
> The claim of dangerousness may also be a post hoc justification. . . . Dangerousness in his prison setting was not a basis for the administrative decision to forcibly medicate defendant.

(App. 349-50 (internal citations and quotations omitted)).

Despite finding the magistrate judge's decision clearly erroneous, the District Court affirmed the magistrate judge's Order respecting forced medication on a different ground. (App. 354). The District Court held that the government's interest in restoring Dr. Sell to competency was alone sufficient to warrant forcible medication:

> This Court agrees with the magistrate judge that this is such a case [warranting involuntary medication for the sole purpose of restoring competency]. The interest in adjudication of the charges is less compelling in cases involving lesser offenses. . . . The seriousness of [the charges against Dr. Sell] contributes greatly to the compelling strength of the government's interest in adjudicating defendant's guilt.

(App. 354). On this ground, the District Court affirmed the magistrate judge's involuntary medication order.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit. On March 7, 2002, a divided panel affirmed the District Court's order over the vigorous dissent of the Honorable Circuit Judge Kermit Bye. While the panel found that Dr. Sell did not pose a danger to himself or others and considered only the non-violent charges, the panel found that Dr. Sell could be involuntarily medicated solely for the purpose of attempting to render him competent to stand trial. On May 7, 2002, in a five-to-four vote, the Eighth Circuit denied Dr. Sell's petition for rehearing *en banc*.

V. Antipsychotic Drugs.

Antipsychotic medications are potent, mind-altering drugs with the potential for severe, irreversible, and even deadly side effects. (*See* App. 185-86 (Richart DeMier ("DeMier") acknowledging that the side effects are "significant")). Antipsychotic drugs do not cure mental illnesses; they simply suppress the symptoms. (App. 136-37 (Dr. Wolfson testifying that drugs stop the expansion of delusions, but do not resolve the underlying illness)). The efficacy of antipsychotic drugs in cases of delusional disorder is uncertain. (App. 345 (Judge Stohr acknowledging the disagreement among experts); App. 215 (DeMier testifying that "in many cases" delusional symptoms abate)).

The potential difficulties inherent in Dr. Sell's efforts to resist forced drugging are complicated by the fact that the government will not disclose the precise drugs or dosage it intends to administer. (App. 185 (DeMier testifying that he "would not recommend one agent over another" because he does not "have the expertise"); App. 238 (Dr.

Wolfson testifying that he prefers "not to get pinned down" to a single drug)). Moreover, the efficacy of the medication varies according to a given case history. (App. 165, 216 (stating antipsychotic medication less effective when treatment delayed for significant period of time)).

At the September 29, 1999 involuntary medication hearing, the government called two witnesses: DeMier, the Center psychologist treating Dr. Sell, and Dr. Wolfson, the Center psychiatrist who consulted for medication purposes. (App. 159). DeMier testified that, although he is not licensed to prescribe medication, he has treated two patients suffering from delusional disorder with antipsychotic medication. (App. 174). Of the two, one was restored to clinical competency. (App. 175). The successful antipsychotic medication was Haldol, a typical antipsychotic drug. (App. 175). The unsuccessful drug was Olanzapine, an atypical antipsychotic drug. (App. 175-76). Dr. Wolfson testified that he had treated four patients with delusional disorder in an institutional setting with antipsychotic medication. (App. 240). One of these patients was apparently restored to competency, relapsed, then restored a second time. (App. 241).

At the hearing, the government witnesses testified that as a result of being medicated, Dr. Sell may develop tardive dyskinesia, a permanent condition which may cause Dr. Sell to have abnormal motor movements. (App. 186). Dr. Sell may also develop neurolectic malignant syndrome, a potentially fatal condition that can cause a person to appear awake, but be listless and dazed. (App. 187). Dr. Wolfson also testified that the new generation of atypical antipsychotic drugs, such as Pimozide, have a more benign side effect profile than the older typical antipsychotic drugs, such as Haldol. (App. 237-38). The

magistrate judge and District Court relied upon this testimony in finding involuntary medication to be appropriate in Dr. Sell's case. (App. 333-34, 354). However, Dr. Wolfson also testified that atypical antipsychotic drugs can only be administered orally, and therefore cannot be used to forcibly drug uncooperative patients like Dr. Sell. (App. 238).

In addition, Dr. Sell presented evidence that directly contradicted the government's testimony regarding the efficacy of antipsychotic medication. Dr. Cloninger testified by affidavit that, in his personal experience, as well as the literature he deemed authoritative, antipsychotic medication is not effective for the treatment of delusional disorder. (App. 30-33). Because delusional disorder is rare, few psychiatrists have experience treating it. (App. 30, ¶4). However, based upon his personal experience and a review of the literature, Dr. Cloninger concluded that "there is no evidence that neuroleptics [meaning, antipsychotic medication] are beneficial for patients with delusional disorder." (App. 31, ¶8). Further, Dr. Cloninger submitted a report by Stein Opjordsmoen and Nils Rettorstol that reached the same conclusion. (App. 31, ¶6; 132-38). He also submitted an authoritative text that indicates antipsychotic medication may be useful for anxiety, agitation, and psychosis, but will not alone be effective in eliminating delusional disorder. (App. 30, ¶5; 92-106).

Dr. Sell also presented the court with a report from the Federal Bureau of Prisons, Metropolitan Correctional Center ("MCC Chicago"), in which Dr. Daniel Greenstein, the forensic psychologist at MCC Chicago, stated that "[d]elusional disorder does not typically respond to pharmacological intervention or psychotherapy." (App. 216-17). In its Order, the District Court specifically acknowledged the conflicting views among the experts. (App. 345 ("there

exist differences of opinion among practitioners in the field, including the experts relied upon by the parties")). Despite the conflict and uncertainty, the District Court ordered that Dr. Sell be forcibly medicated.

VI. Dr. Sell's Confinement at the Center.

Dr. Sell's efforts to resist involuntary medication have been complicated by his continued confinement. The District Court's original April 14, 1999 Order authorized the government to confine Dr. Sell for four months. (Record 341-42). This four-month period expired on August 14, 1999. On August 29, 1999, the District Court entered an order authorizing the government to continue Dr. Sell's confinement for an additional period of time – 120 days. (Record 517-19). The 120-day extension expired on December 27, 1999. Despite the expiration of the District Court's orders, the government continued to confine Dr. Sell. When Dr. Sell moved for relief from this detention, the District Court ordered Dr. Sell confined for an additional 120 days and, to date, has continued to order subsequent 120-day periods of confinement with occasional lapses during which time Dr. Sell has been confined in the Center without an order authorizing his detention. (Record 800; *see also* Record 1001-09).

Dr. Sell's efforts to resist involuntary medication have been further complicated by the nature of his confinement at the Center, which ironically has comported with Dr. Sell's delusions related to persecution by the government. For example, Dr. Sell has spent a significant amount of time isolated in Section 10E, the Center's lockdown unit. In the lockdown unit, detainees are isolated for twenty-three hours a day behind steel doors, notwithstanding that

isolation is contraindicated for persons afflicted with delusional disorder. (App. 180). In addition, Dr. Sell has not received any psychological treatment for his delusional disorder during his confinement at the Center. (App. 177, 188).

Dr. Sell also has been subjected to physical abuse while detained at the Center. For example, Dr. Sell has complained to the District Court that on or about November 9, 1999, between six and twelve guards equipped in riot gear forcibly removed Dr. Sell from his cell, dragged him down the stairs by chains wrapped behind his back, shackled his hands and legs to a heavy object inmates refer to as the "black box," and injected him with a drug that left him unconscious for perhaps as long as a day. (Record 740). Although the incident was videotaped, the Bureau of Prisons has denied Dr. Sell's repeated direct requests for the videotapes and his repeated Freedom of Information Act requests. On another occasion, Dr. Sell has complained that a Center guard attached a hose to a hot water spigot and sprayed Dr. Sell with scalding water while Dr. Sell was locked in the narrow confines of the cage in which he was forced to shower and hence unable to avoid the spray of water.

VII. Dr. Sell's Potential Release.

If Dr. Sell does not become competent, either because involuntary antipsychotic medication is not ordered, or because involuntary medication takes place but does not work, he will not be automatically released. Title 18 U.S.C. § 4241, under which Dr. Sell was hospitalized, states that in such a case a defendant is subject to the provisions of 18 U.S.C. § 4246. Under section 4246, if a defendant is due for release but deemed dangerous to other persons or their

property, the director of the Center is to inform the clerk of the district court and a hearing on this issue must take place. If a finding of future dangerousness is made, the defendant is committed to the custody of the Attorney General or a suitable state facility and semi-annual status reports are required.

SUMMARY OF ARGUMENT

Dr. Sell remains an innocent man – he has never been convicted of any crime – and the government has nonetheless imprisoned him for almost five years without a trial. Even though Dr. Sell has not been found to pose a risk of harm to himself or others, the government seeks to violate his First, Fifth, and Sixth Amendment rights by injecting him – against his will – with permanently mind-altering psychotropic drugs. The government wants to medicate Dr. Sell because it *hopes* that doing so will bring Dr. Sell into an artificially induced, drug-dependent competence, so that the government can bring him to trial on charges involving alleged economic crimes of fraud and money laundering. In other words, the government seeks to justify the deprivation of Dr. Sell's rights on the *chance* that it will be able to prosecute him. Such a constitutionally irreverent justification must be rejected.

In the past, this Court has refused to allow the government to violate an individual's right to bodily integrity when its only motive was a prosecutorial one. In fact, the Constitution only permits intrusions of this magnitude when the life or health of the individual or others is at risk. A citizen cannot be deemed to have forfeited such a fundamental, constitutional right simply based upon the

fact that he is charged with a crime. The government's unconstitutional course of action is particularly egregious because there is no medical consensus that the forced medication of Dr. Sell will result in his competency to stand trial. Even if Dr. Sell did become competent, trial of Dr. Sell in a drug-induced state will result in violations of his Fifth and Sixth Amendment trial rights.

In sum, if the Court of Appeals' decision is allowed to stand, an individual will lose his right to refuse medication based solely upon the government's unproven assertion that the individual is guilty of a non-violent crime and may be rendered competent if non-specified, mind-altering drugs are administered to him. Dr. Sell will also be subjected to potentially long-term and life-threatening side effects caused by the medication. At its core, this case presents the narrow question of whether an innocent individual loses his right to refuse psychotropic medication simply because the government has elected to charge that individual with a crime. Constitutionally, the answer to this question must be no.

ARGUMENT

I. An Innocent Individual Has A Fundamental Right Which Prohibits The Government From Injecting Him With Permanently Mind-Altering, Psychotropic Drugs Against His Will Solely Because It Believes That There Is A Chance To Medicate The Individual Into Drug-Induced "Competence" For Trial.

The right to be free from unwanted physical and mental intrusions has long been recognized as an integral

part of an individual's constitutional freedom – whether it is articulated under the First Amendment as freedom of thought, right to bodily integrity, right to refuse unwanted medical treatment, or right to privacy, under the Fifth Amendment due process clause as a liberty interest or right to privacy, or an aspect of the "right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights." *United States v. Charters*, 829 F.2d 479, 491 (4th Cir. 1987); *see also Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (recognizing First Amendment privacy interest); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citing various sources of right to privacy); *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (recognizing fundamental right for woman to have abortion); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965) (recognizing right to use contraceptives is fundamental); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). Although this Court has never specifically ruled that the right to be free from unwanted medical treatment is a *per se* fundamental right, it has recognized a fundamental freedom in one's bodily integrity.[3] The Court should

[3] *See Cruzan*, 497 U.S. 304-05 (1990) (Brennan, J., dissenting) (stating that majority failed to consider whether right to bodily integrity was fundamental); *Riggins v. Nevada*, 504 U.S. 127, 136 (1992) (stating Court could not reach question of substantive rights); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (assuming, without deciding, that right to refuse medication is at least substantial); *Mills v. Rogers*, 457 U.S. 291, 301 (1982) (recognizing a liberty interest in avoiding unwanted administration of drugs, but deferring to state court to determine whether forced medication is unconstitutional under state constitution); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Casey*, 505 U.S. at 852 (finding fundamental right for woman to have abortion); *Griswold*, 381 U.S. at 485 (recognizing right to use contraceptives is fundamental); *Rochin v. California*, 342 U.S. 165, 171-74 (1952)

(Continued on following page)

explicitly declare, in line with its prior decisions, that the right to be free from compelled medication by the government is fundamental.

A. The Court of Appeals' decision should be reversed because the rights to liberty, bodily integrity, freedom of thought, and privacy are fundamental rights, and the Court of Appeals erred in failing to recognize these fundamental rights.

The existence of a fundamental right must be examined in the light of "our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). The intrusion the government desires to impose on Dr. Sell implicates four intertwined rights which have long been recognized in this nation: his right to bodily integrity, his freedom of thought, his right to privacy, and his liberty interests.

Right to bodily integrity. Even before the ratification of the Constitution, the common law recognized that the touching of a person without consent or legal justification constituted a battery. *See Cruzan*, 497 U.S. at 269. Considering this Court's rulings in other cases against the backdrop of the common law, it becomes quite plain that forcibly medicating a non-violent detainee involves a fundamental right.

As early as 1891, this Court recognized that the Constitution protects a liberty interest in the integrity of

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(finding government cannot force individual to take an emetic based on suspicion that individual swallowed morphine capsules).

one's own body. *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250 (1891). Indeed, in *Cruzan*, this Court later acknowledged that an individual has a liberty interest in refusing unwanted medical treatment, which is protected by the Constitution. *Cruzan*, 497 U.S. at 278-79. Speaking through Chief Justice Rehnquist, this Court held:

> [N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Id. at 269 (citations omitted). "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination," state incursions into the body are deemed repugnant to the interests protected by the Constitution. *Id.* at 287 (O'Connor, J., concurring); *Chandler v. Miller*, 520 U.S. 305, 321-23 (1997) (holding state's requirement that candidates for public office take drug tests unconstitutional).

Not surprisingly, therefore, the trend of modern authority recognizes that an individual has a fundamental right to avoid forced medication. *See United States v. Brandon*, 158 F.3d 947, 957 (6th Cir. 1998) (recognizing fundamental right in avoiding forcible medication); *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (applying analysis similar to strict scrutiny); *Doe v. Dyett*, No. 84 Civ. 6251-KMW, 1993 WL 378867, at *2 (S.D.N.Y. Sept. 24, 1993) (recognizing right to refuse administration of drugs as fundamental); *Andrews v. Ballard*, 498 F. Supp. 1038, 1045-48 (S.D. Tex. 1980) (stating right to refuse treatment encompassed in right to privacy); *Conservatorship of Wendland*, 28 P.3d 151, 154 (Cal. 2001) (determining

incompetent adult has fundamental right to refuse treatment); *Steele v. Hamilton County Cmty. Mental Health Bd.*, 736 N.E.2d 10, 15 (Ohio 2000) (finding right to refuse medical treatment is a fundamental right in our country); *Steinkruger v. Miller*, 612 N.W.2d 591, 596-97 (S.D. 2000) (holding persons involuntarily committed have a federal constitutionally protected liberty interest to refuse the administration of psychotropic drugs); *In re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn. 1996) (finding the right to be free from intrusive medical treatment is a fundamental right); *In re C.E.*, 641 N.E.2d 345, 351-52 (Ill. 1994) (same); *Rasmussen by Mitchell v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987) (same); *In re Schuoler*, 723 P.2d 1103, 1107-08 (Wash. 1986) (same).

Freedom of thought. This Court has long recognized that freedom of thought is protected by the First Amendment and recently reiterated that "the right to think is the beginning of freedom." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002). In fact, "the individual's freedom of conscience [is] the central liberty that unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985); *see also Stanley*, 394 U.S. at 564; *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (recognizing that the Constitution protects "Americans in their beliefs, their thoughts, their emotions, and their sensations"). As this Court recognized, the scrupulous protection of constitutional freedoms prevents the "strangl[ing of] the free mind at its source." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

In *Stanley*, the Court decided whether an individual has a constitutional right to possess obscene material in his home. The *Stanley* Court did not base its decision on

the narrow First Amendment principle that an individual has a right to receive information. Instead, the Court recognized a broader principle: the government cannot control the minds of its citizens. *Stanley*, 394 U.S. at 565. It follows, *a fortiori*, that if the government is prohibited from inquiring into the contents of one's library, it certainly must be prohibited from "impermissible tinkering with the mental processes." *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973) (recognizing that unconsented-to treatment with the drug succinycholine would be unconstitutional). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565 (recognizing First Amendment privacy interest). This "heritage" compels the reversal of the opinions below.

Lower courts have long held that the involuntary administration of drugs affecting a person's mental processes may amount to an interference with an individual's First Amendment rights. *See Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Mackey*, 477 F.2d at 878; *Lojuk v. Quandt*, 706 F.2d 1456, 1465 (7th Cir. 1983) (recognizing that electroconvulsive therapy may violate First Amendment interests). The use of antipsychotic drugs will permanently alter Dr. Sell's brain chemistry, yet the government has presented no conclusive evidence that the forced medication of Dr. Sell will result in his competency. Further, even if the drugs did make Dr. Sell competent, he could be subjected to a myriad of side effects that further affect his ability to think and function and which could cause him harm. *Bee*, 744 F.2d at 1394 (finding that antipsychotic drugs "have the capacity to severely and even permanently affect an individual's ability to think

and communicate"). Dr. Sell's fundamental right to freedom of thought must be protected.

Liberty and privacy interests. While the liberty guaranteed by the Fifth Amendment has not been defined with exactness, the concept has been recognized to include the right of an individual to be free from governmental intrusion into fundamental matters. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding liberty interest in right of unmarried couples to use birth control); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing due process liberty interest protects right to marry); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-86 (1977); *Griswold*, 381 U.S. at 481-86 (finding liberty interest in right of married couple to use birth control). Thus, the substantive component of the due process clause protects individual liberty against certain government actions regardless of the perceived fairness of the procedures used to implement them. In *Albright v. Oliver*, 510 U.S. 266 (1994), this Court specifically noted that the protections of substantive due process "have for the most part been accorded to matters relating to marriage, family, procreation, and *the right to bodily integrity*." 510 U.S. 266, 272 (1994) (citations omitted) (emphasis added); *see also Bee*, 744 F.2d at 1393 (finding individual has a liberty interest in being free from forced medication).

A right is fundamental when it involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *See Casey*, 505 U.S. at 851. Determinations about one's own psychology, one's own mental state, and about one's own physical integrity are undoubtedly the most important personal decisions an individual can make. This Court has stated: "At the heart of liberty is the right to

define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* In sum, whether the label attached to Dr. Sell's interest is freedom of thought, privacy, right to bodily integrity, or a liberty interest, Dr. Sell has a fundamental right to avoid the forced administration of antipsychotic drugs.

Even if this Court determines that Dr. Sell's right to avoid compelled medication is not fundamental, due process still prohibits the conduct advocated by the government here. Due process requires that this Court ascertain whether the government's conduct "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples, even those charged with [criminal] offenses." *Rochin*, 342 U.S. at 169. This Court has recognized that the Constitution protects "fundamental human dignity" and evidences the "evolving standards of decency that mark the progress of a maturing society." *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (finding that Eighth Amendment prohibits execution of an insane individual); *see also Foucha v. Louisiana*, 504 U.S. 71 (1992) (recognizing that due process prohibits "arbitrary, wrongful government actions"). Allowing the government's prosecutorial might to extend into physical intrusions into an individual's mind violates the minimum standards of due process, particularly where, as here, the government has not indicated the drugs it would administer, making a complete evaluation of the deprivation impossible.

B. The Court of Appeals' ruling must be reversed because the forced administration of mind-altering, psychotropic drugs is an irreversible intrusion into an individual's freedom of thought, liberty interests, privacy interests, and bodily integrity.

Although the physical invasion caused by the forced administration of antipsychotic drugs is achieved through the mere injection of a needle, the impact of psychotropic drugs upon the brain is "mind altering" and "sufficient to undermine the foundations of personality." *In re Guardianship of Roe*, 421 N.E.2d 40, 52, 53 (Mass. 1981); *Mills*, 457 U.S. at 293 n.1; *Cochran v. Dysart*, 965 F.2d 649, 650 (8th Cir. 1992). In fact, there are few medical procedures "which are more intrusive than the forcible injection of antipsychotic drugs." *In re Roe*, 421 N.E.2d at 52. As one court aptly noted:

> We have little doubt that if the medical treatment at issue here was psychosurgery, such as lobotomy, it would be readily apparent that very significant interests concerning freedom of thought were implicated. . . . There is [] no principled distinction between the chemical invasion of drug therapy and the mechanical invasion of surgery.

Charters, 829 F.2d at 489.

Not only do antipsychotic drugs suppress the symptoms of mental illness, they also "affect the well functioning aspects of personality." *Id.* Here the record reflects that, as a result of being medicated, Dr. Sell may develop tardive dyskinesia, a permanent condition which may cause Dr. Sell to have abnormal motor movements. (App. 186). Dr. Sell may also develop neurolectic malignant

syndrome, a potentially fatal condition that can cause a person to appear awake, but be listless and dazed. (App. 187). At best, the government cannot be sure of the effect because it does not state (and has not been required to state) which drugs it would use.

In any case, the significant intrusion caused by psychotropic drugs does not end with the mind-altering effects. *See* Dennis E. Cichon, *The Right to "Just Say No:" A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 297-314 (1992) (describing effects of antipsychotic drugs). Courts have recognized that antipsychotic drugs may cause "serious and irreversible injury in a significant percentage of cases." *Charters*, 829 F.2d at 478. "While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." *Harper*, 494 U.S. at 229. Antipsychotic drugs carry a significant risk of adverse side effects, including

> neurological syndromes as parkinsonisms, characterized by a mask-like face, retarded volitional movements, and tremors; akathisia, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, a disease characterized in its mild form by involuntary muscle movements, especially those around the mouth. Tardive dyskinesia can be even more disabling in its most severe forms.

Mills, 457 U.S. at 293 n.1. As Justice Stevens recognized in *Harper*: "The invasion [of a person's bodily integrity] is particularly intrusive if it creates a substantial risk of permanent injury and premature death." 494 U.S. at 237 (Stevens, J., concurring in part and dissenting in part).

Thus, because of the possibly long-lasting effects of the drugs, once the government is permitted to infringe upon Dr. Sell's rights, the infringement could well be a permanent one.

The government's attempt to medicate is particularly troubling because Dr. Sell has never been adjudged incompetent to make medical decisions. The fact that Dr. Sell has been found incompetent to stand trial does not determine whether he is competent to make medical decisions. *Charters*, 829 F.2d at 495. "[T]he law will presume sanity rather than insanity, competency rather than incompetency; [and] . . . that every man is sane and fully competent until satisfactory proof to the contrary is presented." *Id.* (citations omitted). Because the law assumes an individual is competent until declared otherwise, Dr. Sell's decision regarding whether to be medicated should be honored.[4]

[4] Under no circumstances, however, would a prosecutor be the proper party to make Dr. Sell's medical decisions. If Dr. Sell was found incompetent to make his medical decisions, a guardian should be appointed to make them. *See* Jeanne Louise Carriere, *Reconstructing the Grounds for Interdiction*, 54 LA. L. REV. 1199, 1199 n.4 (1994) ("Traditionally, in common law, a finding of 'non compos mentis or incompetence' led to the appointment of a guardian. . . .") (citing Prefatory Note, UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT, 8A U.L.A. 441 (1982)). Even if a guardian is appointed, Dr. Sell's desire to withhold consent for medication is critical: "The guardian must consider the ward's expressed desires and personal values when making decisions." Prefatory Note, UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997), 8A U.L.A. 113 (1993 & Supp. 2002).

II. The Government's Interest In Trying Dr. Sell Does Not Override His Fundamental Right To Remain Free From Forced Medication And From Being Subjected To The Serious Side Effects Resulting Therefrom.

A determination that an individual possesses a fundamental right does not end the inquiry of whether a person's constitutional rights have been violated. In applying strict scrutiny, the Court must balance the individual's liberty interest against the government's stated interests. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding strict scrutiny required when considering sterilization laws). As the impact of the decision on the life of the individual increases, so must the importance of the government's interest. Therefore, when fundamental rights are at stake, the government must prove that it has a compelling interest significant enough to override the individual's interest and that it is using the least restrictive means possible to effectuate its interest. *See Skinner*, 316 U.S. at 541. Here, the government's interest is not sufficiently compelling to override Dr. Sell's fundamental rights because: (1) this Court has never before allowed an intrusion this invasive solely for prosecutorial purposes; (2) the government's interest is severely diminished (if not vitiated) by the uncertainty of whether any medication will render Dr. Sell incompetent; (3) the government's interest in bringing Dr. Sell to trial will not be met if he is heavily medicated during the trial; and (4) the government's interests are lessened even further by the nonviolent nature of the crime and the fact that Dr. Sell is not a danger to himself or others.

The government wishes to override Dr. Sell's fundamental right to be free from bodily intrusion under

the First and Fifth Amendments, so that it can try him for what amounts to charges of insurance fraud.[5] While this Court has never considered whether the government can violate a pretrial detainee's constitutional rights without asserting any penological objectives, this Court's prior rulings mandate the constitutional answer. It is well-established that the government may detain a person suspected of committing a crime prior to an adjudication of guilt. *See Gerstein v. Pugh*, 420 U.S. 103, 111-14 (1975). Obviously, however, prior to conviction an individual committed to pretrial detention has not been adjudged guilty of any crime. While incarcerated, therefore, a pretrial detainee must be presumed to be innocent of alleged, prior criminal conduct. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Bell v. Wolfish*, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

Government's sole motive is prosecutorial. Allowing the forced medication of Dr. Sell would grant the government unprecedented power, as this Court has never allowed such an intrusive invasion solely for a prosecutorial purpose. *See Ferguson v. Charleston*, 532 U.S. 67, 86 (2001) (holding testing pregnant women for drugs solely

[5] The violation of Dr. Sell's constitutional rights is further compounded by the fact that the government does not have legal custody over Dr. Sell. *Sell*, 282 F.3d at 573 (Bye, dissenting) (finding sentencing range to be 33 to 41 months).

for prosecutorial purpose is unconstitutional); *Winston v. Lee*, 470 U.S. 753, 767 (1985); *Rochin*, 342 U.S. at 171-74. In *Riggins*, Justice Kennedy noted:

> [A]bsent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial.

504 U.S. at 139 (Kennedy, J., concurring) (expressing doubt that the government will be able to make such a showing in most cases). Importantly, in this Court's jurisprudence where physical intrusions of the body were permitted, the Court also has recognized that the outcome would have been different had the effects of the intrusion been permanent. *See Schmerber v. California*, 384 U.S. 757, 772 (1966). For example, in *Schmerber*, which allowed the compelled tests of an accident victim's blood alcohol content, the Court reiterated: "[t]hat we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under strictly limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* In this case, there is real potential for permanent adverse effects. Further, it is clear that this Court's prior jurisprudence only allows the government to medicate an individual against his will if the individual's safety or the safety of others is at stake. *See Riggins*, 504 U.S. at 135 (finding medication appropriate if "essential for the sake of Riggins' own safety or the safety of others"); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979) (providing standard for civil commitment and requiring that person be danger to himself or others). The safety interest present in *Riggins* is not present in Dr. Sell's case.

Moreover, and pertinent here, this Court has specifically rejected the idea that a person who is incompetent to stand trial can be treated differently than non-accused incompetent individuals, simply based on the fact that the government has charged him with a crime. *Jackson v. Indiana*, 406 U.S. 715, 729-30 (1972) (finding state may not have lower standard for civil commitment for individuals accused, but not convicted, of crimes). The District Court opinion and the Court of Appeals' panel opinion afford Dr. Sell, a pretrial non-dangerous detainee, fewer due process rights than those afforded convicted felons under established law. A convicted felon cannot be involuntarily medicated unless he is a danger to himself or others within the prison setting and the medication is deemed medically appropriate. *Harper*, 494 U.S. at 227. By permitting the involuntary medication of a non-dangerous pretrial detainee, the courts below fashioned a test that affords an individual presumed innocent with fewer rights and protections than those of a convicted individual who can only be medicated if dangerous.

Thus, several courts have determined that the government's interest in rendering the detainee competent did not justify administration of medication involuntarily. *See Cochran*, 965 F.2d at 651 (recognizing a prisoner cannot be forcibly medicated against his will when not a danger to himself or others); *Woodland v. Angus*, 820 F. Supp. 1497, 1511 (D. Utah 1993); *United States v. Santonio*, No. 2:00-CR-90C, 2001 WL 670932, at *4 (D. Utah May 3, 2001) (same); *see also State v. Perry*, 610 So. 2d 746, 771 (La. 1992) (finding a prisoner cannot be medicated so that he can be executed).

Uncertain outcome. The government's interest is further diminished by the uncertainties of the medication

and the side effects thereof. There is no certainty that Dr. Sell will become competent if medicated. One of the government's witnesses, DeMier (a psychologist who cannot prescribe medication) testified that he had only treated two patients with delusional disorder and had only been successful in making one of the two competent. (App. 174-75).[6] Moreover, the efficacy of antipsychotic drugs in cases of delusional disorder is uncertain at best. (App. 345 (Judge Stohr acknowledging the disagreement among experts)). There were three sources of evidence on the question of the medical appropriateness of psychotropic medication for individuals suffering from delusional disorder presented at the hearing before the magistrate judge: the testimony of the Bureau of Prisons witnesses, DeMier and Dr. Wolfson; Dr. Robert Cloninger, who testified via affidavit; and a report from Dr. Greenstein from the Federal Bureau of Prisons, Metropolitan Correctional Center, a forensic psychologist. While government witnesses DeMier and Dr. Wolfson, who were advocating medicating Dr. Sell, testified that the use of antipsychotic medication was medically appropriate, Dr. Cloninger's testimony was clear that "there is no evidence that [antipsychotic medications] are beneficial for patients with Delusional Disorder." (Record 414). Similarly, Dr. Greenstein stated in his report that delusional disorders do not typically respond to medication or psychotherapy. (App. 216-17). In fact, the very text relied upon by DeMier and Dr. Wolfson as authoritative, (App. 211, 260-61), the

[6] Because Dr. Sell has not been given the names, diagnosis, or treatment for either one of these individuals, Dr. Sell was unable to test or verify the accuracy of DeMier's statements.

COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, states that there are no controlled studies reported to support the practice of treating delusional disorder with antipsychotic medication. (Record 978).

Ordering involuntary medical treatment presupposes that the treatment is medically appropriate, *Riggins*, 504 U.S. at 127, which is not the case here. There is no basis in the record for such a conclusion. Given the severity of the potential effects of forced medication, the government's position that it *might* be able to make Sell competent should be given little weight.

Heavily medicated defendant. Although Dr. Sell does not downplay the importance of the government's interest in trying individuals accused of crimes, it is questionable that the government's objective will be met by trying a heavily medicated defendant, especially when that person has already been in custody longer than allowable on the insurance fraud charges.[7] The government admits that if it medicates Dr. Sell, the side effects of the drugs may cause Dr. Sell to be unable to control his facial muscles or may cause Dr. Sell to appear dazed and listless. As discussed in Section III, *infra*, these side effects will constitutionally impair Dr. Sell's trial rights. The

[7] Further, the government has not tried less intrusive means of making Dr. Sell competent. At the hearing, DeMeir testified that Dr. Sell was not receiving any treatment for his condition and that Dr. Sell was being kept in solitary confinement, which may be exacerbating his mental illness. (App. 180-81, 188). "I should think that any alternative would be less intrusive than toying with an accused's brain chemistry." *Riggins v. Nevada*, 860 P.2d 705, 707 (Nev. 1993) (Springer, J., dissenting).

government's interest in bringing a defendant to a fatally flawed trial are minimal, at best.

Non-violent crime and non-dangerousness. The government's interest is lessened even further because the government's only basis for medicating Dr. Sell is the government's belief that Dr. Sell is guilty of non-violent crimes, involving only economic losses. This interest cannot be compelling enough to overcome Dr. Sell's constitutional rights.[8] Although the government possesses an interest in bringing a defendant to trial, not "every charge is sufficient to justify forcible medication of a defendant." *See Sell*, 282 F.3d at 572 (Bye, J., dissenting) (finding charges against Dr. Sell insufficient to justify forcible medication). While the Eighth Circuit panel also recognized that "[n]ot all charges . . . are sufficient to justify forcible medication of a defendant," it cursorily determined that the charges against Dr. Sell are "serious" and that Dr. Sell's interest in avoiding forced medication is outweighed by the government's essential interest. *Sell*, 282 F.3d at 568. The Eighth Circuit's one-sentence examination of the nature of the crimes for which Dr. Sell was indicted does not pass constitutional muster.

The government cannot present a compelling interest when the defendant is charged with a non-violent crime. *See Brandon*, 158 F.3d at 961 (finding government's interest in prosecuting individual for sending threatening mail is not compelling enough); *Bee*, 744 F.2d at 1395 (questioning whether the state's interest in trying suspects

[8] The government's interest in even further diminished, considering that the statute specifically contemplates civil commitment as an alternative remedy. *See* 18 U.S.C. § 4246(b).

could ever outweigh the individual's interest in avoiding forcible treatment with antipsychotic drugs and stating "[t]he needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned"). As noted by the dissenting judge of the Nevada Supreme Court after remand in *Riggins*: "[W]hen I balance the need to bring insane persons to justice against the ignominy of forcing mind-altering drugs down the throats of persons who are presumed to be innocent, I opt in favor of the rights of the individual as against the rights of the State." *Riggins*, 860 P.2d at 706 (Springer, J., dissenting).

Dr. Sell respectfully submits that, because the effects of psychotropic drugs on an individual may cause permanent changes in brain chemistry and muscular control, forcibly medicating that individual for the sole purpose of inducing "competence," when the individual has not been found guilty of a crime (and who still must enjoy the presumption of innocence), can only be justified by a government interest of the highest order. Dr. Sell's rights under the common law and under the Constitution were not extinguished simply because the government charged him with a crime.

Indeed, this Court has previously held that prosecutorial motive alone is not enough to violate an individual's constitutional rights. *Winston*, 470 U.S. at 766-67 (holding government's desire to prosecute defendant did not outweigh defendant's Fourth Amendment rights); *Rochin*, 342 U.S. at 171-74 (finding that requiring an individual to ingest an emetic so that police could obtain drugs is unconstitutional). The government does not have a compelling interest in forcing Dr. Sell to be subjected to mind-altering medications so that it can try him for a non-violent crime, the trial for which is likely to be

constitutionally contaminated by the effects of the very drugs the government now seeks to force upon Dr. Sell.

III. Dr. Sell Has Fundamental Trial Rights Under The Fifth and Sixth Amendments Not To Be Medicated Into Drug-Induced, Synthetic Sanity.

Dr. Sell's trial rights as guaranteed by the Fifth Amendment and Sixth Amendment include the rights (1) to present a defense, including a diminished capacity defense, *see* FED. R. CRIM. P. 12.2(b); (2) to not have the government manipulate his appearance in a way that prejudices him before the jury, *Illinois v. Allen*, 397 U.S. 337, 345 (1970); (3) to not be tried unless he is competent to "consult with counsel, and to assist in preparing his defense," *Drope v. Missouri*, 420 U.S. 162, 171 (1975); and (4) to testify and "present his own version of events in his own words," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). Moreover, the government cannot suppress "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). All of these rights would be violated if Dr. Sell is tried while compulsorily medicated.

Right to present defense. Antipsychotic medication affects the defendant's ability to assist in his defense and, in essence, forces the accused to provide the jury with a coerced confession of his mental state. *See Riggins*, 504 U.S. at 137; *id.* at 143 (Kennedy, J., concurring); *Rochin*, 342 U.S. at 175 (Black, J., concurring) (finding person is compelled to be witness against himself when "incriminating evidence is forcibly taken from him by contrivance of modern science"). In a case where diminished capacity is raised as a defense, the jury must assess their belief about defendant's mental state at the time the crime occurred.

"[I]f the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *People v. Hardesty*, 362 N.W.2d 787, 796 (Mich. Ct. App. 1984). The accused, sitting in the courtroom drugged and listless, becomes an instrument of his own conviction, with his calm and controlled demeanor rebutting his own case without a single word being uttered.

Further, compulsory medication of a defendant makes it easier for the government to rebut the accused's defense of diminished capacity by suppressing the most persuasive evidence of the individual's demeanor at the time the crime occurred. Due process does not allow the government to suppress "evidence favorable to an accused . . . where the evidence is material to either guilt or punishment." *Brady*, 373 U.S. at 87. As this Court has recognized, "the most important witness for the defense in many criminal cases is the defendant himself." *See Rock*, 483 U.S. at 52. After antipsychotic drugs are administered, the defendant is deprived of the best evidence of his mental state at the time of the alleged crime – his own demeanor in an unmedicated state. Postmedication review of an individual's Sixth Amendment rights may come too late to prevent impairment of that right. *See United States v. Weston*, 206 F.3d 9, 14 (D.C. Cir. 2000).

Right to not have government manipulate appearance. Further, the right to a fair trial also means that one accused of a crime "is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). If the government alters Dr. Sell's outward appearance by medicating him with drugs that cause numerous

side effects affecting his demeanor, it will fatally flaw any criminal proceedings against him. *See Allen*, 397 U.S. at 344-45 (finding sight of shackles will have significant effect on the jury's feelings about defendant); *Estelle*, 425 U.S. at 504 (finding it unconstitutional to require accused to appear at trial in prison uniform); *Spain v. Rushen*, 883 F.2d 712, 720-21 (9th Cir. 1989) (finding defendant unable to meaningfully participate in trial due to shackles and shackles caused prejudice with jury); *State v. Maisonet*, 763 A.2d 1254, 1260 (N.J. 2001) (stating that defendant was denied fair trial when forced to appear in court disheveled based on police's failure to provide him with a comb and soap).

In *Illinois v. Allen*, this Court ruled that requiring a prisoner to appear before the jury in shackles "might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." 397 U.S. at 344. If requiring an accused to appear in court in shackles or disheveled violates an individual's rights, certainly the government cannot alter the detainee's appearance by forcing him to take drugs that make him appear nervous and anxious or rigid and remorseless.

Right to confront witnesses and participate in defense. Although it may be argued that the administration of drugs makes it more likely that the individual will be able to participate in his trial, this view forgets the side effects caused by the medication. These side effects will affect Dr. Sell's ability to pay attention to witnesses, attorneys, or anyone else in the courtroom, to listen and respond to questions, and to offer comments about the proceedings. The pace of criminal proceedings requires an

individual to be able to listen to information from multiple sources and interact with counsel fairly rapidly. The side effects of the psychotropic drugs could significantly hamper Dr. Sell's ability to do so.

Right to testify in own defense. Dr. Sell's ability to testify in his own defense, if he so chooses, will also be hampered as Dr. Sell will be faced with a Hobson's choice: testify and hope that the jury is not improperly swayed by the listlessness or stiffness resulting from the medication or refuse to testify and risk that the jury is still improperly affected by these same considerations. Trying Dr. Sell, while under compelled medication, violates his Fifth and Sixth Amendment trial rights.

Further, unlike Dr. Sell's right to bodily integrity protected by the First and Fifth Amendments, Dr. Sell's trial rights under the Fifth and Sixth Amendment are not to be balanced against the government's interest in bringing him to trial. Rather, the "probability of deleterious effects" on fundamental trial rights "calls for close judicial scrutiny." *Estelle*, 425 U.S. at 504. Thus, unless an accused somehow waives his Fifth and Sixth Amendment trial rights, the violation of these rights will not be excused unless they constitute harmless error. *Id.* at 507. Given the numerous effects medication will have on Dr. Sell's trial rights, the government cannot show that forced medication would constitute harmless error.[9]

[9] Even if the government's attempts to drug Dr. Sell do not violate the Constitution, this Court should use its supervisory powers to prohibit the standardless drugging of Dr. Sell. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining *civilized standards of*

(Continued on following page)

IV. The Forced Medication Of Dr. Sell Would Violate His Fifth Amendment Procedural Due Process Rights.

A. Dr. Sell's Fifth Amendment due process rights were violated because the government was not required to prove its case by clear and convincing evidence.

This Court has not decided the issue of the government's burden of proof when it seeks involuntary medication of a pretrial detainee. Lower court and state court decisions on this issue require various burdens of proof, and many courts do not discuss the government's burden of proof when addressing forced medication issues. *See United States v. Gomes*, 289 F.3d 71, 88 (2d Cir. 2002) (failing to discuss burden of proof); *Brandon*, 158 F.3d at 960-61 (requiring proof by clear and convincing evidence); *State v. Garcia*, 658 A.2d 947, 967 (Conn. 1995) (requiring

procedure. . . . " *McNabb v. United States*, 318 U.S. 332, 340 (1943) (emphasis added). Acting under its supervisory power, this Court " 'may formulate procedural rules not specifically required by the Constitution or Congress,' " *United States v. Awadallah*, 202 F. Supp. 2d 17, 52 (S.D.N.Y. 2002) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)), including rules designed to "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury," *Hasting*, 461 U.S. at 505.

If the drugging of Dr. Sell is allowed, the jury will have before it a defendant whose appearance, demeanor, testimony, and assistance with and participation in his defense will have been altered. Moreover, permitting the government to engage in "drug first, evaluate later" tactics, especially in violation of Dr. Sell's Sixth Amendment rights, contradicts "civilized standards of procedure" – standards which "are not satisfied merely by observance of those minimal historic safeguards. . . . " *McNabb*, 318 U.S. at 340. The involuntary medication of Dr. Sell violates foundational standards of due process of law, "below which we reach what is really trial by force." *Id.*

proof by clear and convincing evidence); *Kheim v. United States*, 612 A.2d 160, 172 (D.C. Cir. 1992) (adopting medical judgment standard).

Dr. Sell's case exemplifies the confusion in the courts regarding the burden of proof to be applied. While the District Court affirmed the magistrate judge's use of a "substantial and very strong showing" standard, the Court of Appeals required the government to prove, by clear and convincing evidence, that the medication is appropriate. (*See* App. 333, 354, 366-67). It is unclear what burden of proof the government is required to meet for the remaining two factors in the Court of Appeals' three-part test.

This Court, however, has mandated that the government prove its case by clear and convincing evidence when "the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." *Cruzan*, 497 U.S. at 282 (citations omitted). Thus, the Court has required proof by clear and convincing evidence in deportation proceedings, *Woodby v. INS*, 385 U.S. 276, 285-86 (1966); in denaturalization proceedings, *Schneiderman v. United States*, 320 U.S. 118, 153 (1943); and in civil commitment proceedings, *Addington*, 441 U.S. at 433. A defendant's constitutional right of bodily integrity should be granted equal protection with these important rights. Dr. Sell's substantive due process rights were violated when the government was not required to prove all elements of its case by clear and convincing evidence.

B. The forced medication of Dr. Sell does not comport with any notions of due process.

Before injecting a person with antipsychotic drugs, the government must establish, at a minimum, that the medication is necessary and appropriate. *See Harper*, 494 U.S. at 222 n.8. In this case, the government was not even required to inform Dr. Sell or the District Court which type of drugs or dosage it planned on injecting into him.[10] Certainly, a showing of medical appropriateness requires that the government provide the Court and the defendant with the name and proposed dosage of the antipsychotic drug to be administered, so that the defendant can rebut any assertions made by the government.

This Court has "underscore[d] the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state." *See Ford*, 477 U.S. at 414. The adversarial process is especially important in matters of competence because psychiatrists often differ as to the proper treatment for a particular diagnosis. *See id.* The record in this case illustrates that substantial disagreement exists regarding the treatment for delusional disorder. (App. 30, 345). Without knowledge of the drugs to be used and the dosage of those drugs, Dr. Sell has been denied the ability to fully question and rebut the opinions offered by the government's witnesses. The standardless drugging of pretrial detainees,

[10] It must also be questioned whether physicians employed by the government can truly make an independent determination that medication is in a pretrial detainee's best interest.

without the normal safeguards of a full and fair adversarial process, cannot comport with due process.

CONCLUSION

For the foregoing reasons, Dr. Sell respectfully requests that the Court rule that forced administration of antipsychotic drugs for the sole purpose of prosecuting him for a non-violent crime violates his First, Fifth, and Sixth Amendment rights.

Respectfully submitted,

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